

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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JULIA HALL and JAMES HALL,

Plaintiffs-Appellees,

V

TIMOTHY P. MCAULIFFE and FOREST  
BEACH JOINT VENTURE, a/k/a T. L. LEISURE,  
INC.,

Defendants-Appellants.

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UNPUBLISHED  
September 14, 2004

No. 244848  
Allegan Circuit Court  
LC No. 00-027288-CH

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SUSAN TABOR WAHMAN,

Plaintiff-Appellee,

V

TIMOTHY P. MCAULIFFE and FOREST  
BEACH JOINT VENTURE, a/k/a T. L. LEISURE,  
INC.,

Defendants-Appellants.

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No. 244852  
Allegan Circuit Court  
LC No. 01-029206-CH

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Before: Griffin, P.J., and Wilder and Zahra, JJ.

PER CURIAM.

In these consolidated appeals, defendant<sup>1</sup> appeals as of right from the trial court's judgments finding in favor of plaintiffs on their claims for adverse possession and declaring plaintiffs the fee simple titleholders to property which lies adjacent to plaintiffs' platted lots in the Chicago Addition to the Macatawa Park subdivision, located along the shore of Lake Michigan and known as Kalamazoo Avenue. We affirm.

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<sup>1</sup> For purposes of this appeal, "defendant" collectively refers to defendant McAuliffe and the defendant companies.

## I. Basic Facts and Proceedings

Plaintiffs Julia and James Hall (the Halls) and Susan Tabor Wahman (Wahman) own separate lots in the Chicago Addition to the Macatawa Park subdivision. Their respective properties abut an area which, though designated as Kalamazoo Avenue on the plat for the Chicago Addition, was never developed as a road. As platted, Kalamazoo Avenue runs from east to west between several lots in the Chicago Addition, providing access to Lake Michigan on the west side.

The Halls own two lots, Lot 69 and Lot 70, where the lots abut Kalamazoo Avenue on the north and south sides, respectively, so that Kalamazoo Avenue runs between the Halls' two lots. The Halls' cottage and other improvements are situated on Lot 69, but protrude into Kalamazoo Avenue. Wahman owns the western half of two adjacent lots, Lot 64 and Lot 65 of the same plat, where Lot 64 abuts the south side of Kalamazoo Avenue, closer to the shore of Lake Michigan. Wahman's cottage and other improvements on her portion of Lot 64 also protrude into Kalamazoo Avenue. Defendant is the developer of the Forest Beach subdivision located behind the Chicago Addition. This litigation arose from defendant's attempts to construct a pathway along Kalamazoo Avenue to provide Forest Beach subdivision residents access to the beach along Lake Michigan.

Wahman and the Halls filed separate actions against defendant and the trial court consolidated the cases for trial. A bench trial was conducted, during which plaintiffs each claimed ownership to the areas adjacent to and contiguous to their respective homes by adverse possession. In contrast, defendant asserted that he owned "all roads and walks located in the Plat of the Chicago Addition" through claim of title from a quitclaim deed, and that his paper title<sup>2</sup> required plaintiffs, as "permissive users" to meet a heightened burden proof to establish adverse possession, akin to that required between cotenants. Defendant did not contest plaintiffs right to remain in the structures that extended into Kalamazoo Avenue; however, defendant contested plaintiffs' claims of ownership beyond those areas.

After the trial concluded, but before the trial court issued an opinion, Greg and Patricia Dalman, Wahman's neighbors and owners of the eastern half of Lot 64, filed a post-trial motion to intervene. The Dalmans argued they would be prejudiced if the trial court recognized Wahman's claim of adverse possession to the area immediately north of their half of Lot 64. A hearing was held, where the trial court indicated that it did not anticipate awarding the respective plaintiffs any property directly north of the Dalmans' lot. Defendant moved for a mistrial, claiming plaintiffs conspired to deprive defendant of its legal interest in the property, which the

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<sup>2</sup> At trial, except to the extent that plaintiffs asserted their claims of adverse possession, they did not dispute defendant's claim of legal title to the area referred to as Kalamazoo Avenue. For purposes of our review, we will treat defendant as the legal titleholder to the disputed property. We note, however, that, while it was undisputed that at least defendant or one of the defendant companies had legal title, defendant did not offer a deed or other documentary evidence to establish title to the disputed property. We express no opinion concerning the validity of defendant's claims of ownership as the actual legal titleholder of the disputed property.

court denied. The trial court subsequently issued an opinion, finding that plaintiffs established their respective claims of adverse possession against defendant. Accordingly, the trial court entered judgment in favor of plaintiffs, vesting them with title in fee simple to the areas of Kalamazoo Avenue immediately adjacent and contiguous to plaintiffs' respective lots. The Halls were awarded the entire area referred to as Kalamazoo Avenue that was located between Lots 69 and 70, and Wahman was awarded the portion of the area that abutted her half of Lot 64. Subsequent to trial, the parties filed several post-judgment motions. Defendant filed a motion for a stay of proceedings pending post-trial motions and any appeal; plaintiff filed a motion for clarification of the trial court's opinion and entry of judgment; and the Dalmans' filed another motion to intervene, conditioned on whether the trial court entered a judgment affecting the area directly north of their property, Lot 64. At the hearing held regarding the various motions, the trial court denied defendant's motion for a stay and clarified its previous ruling to reflect its intent to only award Wahman that half of Kalamazoo Avenue closest to her cottage. Declining to amend its previous opinion, the trial court determined that the Dalmans or any other party, who had a prescriptive claim to Wahman's portion of Kalamazoo Avenue, was not prevented from pursuing a separate claim. Defendant filed another motion for a new trial, claiming newly discovered evidence and plaintiffs committed fraud. Defendant's motion for a new trial was denied, and the trial court entered separate judgments containing a metes and bounds description of plaintiffs' respective properties. This appeal followed.

## II. Standards of Review

Because plaintiffs' actions were in the nature of an action to quiet title, we review the trial court's decision de novo. See MCL 600.2932; MCR 3.411; *Hall v Hanson*, 255 Mich App 271, 277-281; 664 NW2d 796 (2003) (an action to quiet title is an appropriate means to lift a cloud from a title; it is distinct from a statutory action to modify a recorded plat); *Killips v Mannisto*, 244 Mich App 256, 258; 624 NW2d 224 (2001).

A trial court's conclusions of law in a bench trial are also reviewed de novo. MCR 2.613; *Chapdelaine v Sochocki*, 247 Mich App 167, 169; 635 NW2d 339 (2001). But we review the trial court's factual findings for clear error. *Id.*; *Killips, supra* at 258. Deference is given to the trial court's special opportunity to judge the credibility of witnesses who appeared before it. MCR 2.613(C). But "where the trial court's factual findings may have been influenced by an incorrect view of the law, an appellate court's review of those findings is not limited to clear error." *Walters v Snyder*, 239 Mich App 453, 456; 608 NW2d 97 (2000).

## III. Analysis

Defendant first claims that, as a matter of law, the trial court was required to treat plaintiffs as "permissive users" of the area known as Kalamazoo Avenue, or hold plaintiffs to heightened standard of proof, requiring plaintiffs to demonstrate that defendants or their

predecessors in title had actual notice of plaintiffs' hostile claims.<sup>3</sup> We disagree. "Determination of what acts or uses are sufficient to constitute adverse possession depends upon the facts in each case and to a large extent upon the character of the premises." *Burns, supra* at 14. The rationale for applying a heightened standard of notice when an entry is permissive is that rightful possession does not import adverse possession. *Dunlop v Twin Beach Park Ass'n*, 111 Mich App 261, 266; 314 NW2d 578 (1981). "Where an entry is permissive, the possession cannot become adverse until direct notice of hostile claim is given the owner." *Grand Rapids v Pere Marquette R Co*, 248 Mich 686, 690; 227 NW 797 (1929). The possession by a person who does nothing inconsistent with the permission does not become adverse until notice is given of the hostile claim. *Id.* at 690-691.

The trial court did not make any specific findings regarding whether plaintiffs had an "easement," but considered that the disputed area was designated on the plat for the Chicago Addition as a roadway. An easement is a "right to use the land of another for a specific purpose." *Killips, supra* at 258. An easement gives no title to the land upon which it is imposed, but does constitute an interest in land. *Thies v Howland*, 424 Mich 282, 289 n 5; 380 NW2d 463 (1985). "Under our well-established easement jurisprudence, the dominant estate may not make improvements to the servient estate if such improvements are unnecessary for the effective use of the easement or they unreasonably burden the servient tenement." *Little v Kin*, 468 Mich 699, 701; 664 NW2d 749 (2003). The dominant estate must strictly confine the use to the purpose of the easement. *Delaney v Pond*, 350 Mich 685; 687; 86 NW2d 816 (1957). An easement, even when analyzed from the perspective of the owner of the servient estate, may be extinguished by a use inconsistent with the easement. See *Nicholls v Healy*, 37 Mich App 348, 349; 194 NW2d 727 (1971).

When a road is dedicated to the public, it generally carries with it a right of public travel and other uses, such as the installation of sewers and lighting, that are commonly adopted by public authorities for the benefit of the people. See *Grosse Pointe Shores v Ayres*, 254 Mich 58, 64; 235 NW 829 (1931). Private roads may have restricted uses, but are still subject to governmental regulation. See *Bevan v Brandon Twp*, 438 Mich 385, 390; 475 NW2d 37 (1991).

A dedication can be without restriction or for a particular purpose, in which case it must be devoted to the dedicator's indicated purpose. See generally *Baldwin Manor, Inc v Birmingham*, 341 Mich 423, 430; 67 NW2d 812 (1954). A dedication of land can be public or private, and can arise under the common law or statute. *Little v Hirschman*, 469 Mich 553, 557-

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<sup>3</sup> Defendant's assertion that plaintiffs were permissive users derives from defendant's characterization of plaintiffs as easement holders, as a matter of law, with a shared right to access and use of Kalamazoo Avenue. Defendant argues that because the original dedication of the plat in 1896 did not include a statement whether the road was public or private, and because there was no express easement, plaintiffs merely "obtained and ha[ve] always possessed a comprehensive easement implied by law, to utilize the roads and walkways in any normal and usual manner."

558; 677 NW2d 319 (2004). A dedication may have the effect of creating an easement. *Id.* at 557. A recognized means of effectuating a private easement is a dedicatory clause in a plat. *Id.* at 560. Purchasers of property conveyed with reference to a recorded plat in their deeds may, depending on the applicable law, be presumed to accept the benefits and liabilities associated with a private dedication. See *Martin v Beldean*, 469 Mich 541, 549 n 19; 677 NW2d 312 (2004).

In the present case, assuming without deciding that the mere designation of a roadway in the plat might be sufficient to create an easement in favor of lot owners in the Chicago Addition, defendant's claim nonetheless fails. While there is no indication in the record that the platted use was intended to serve individual lot owners, as distinguished from providing a right-of-way for all property owners or members of the public to travel east and west through the Chicago Addition, the trial evidence was overwhelming that the disputed property was not used as a road, in the form of a trail open to the public or otherwise. Even if we were to accept defendant's claim that lot owners had an easement to use the property as a road, plaintiffs' various acts of constructing barriers, fencing, a culvert and drain pipes would constitute hostile acts because they were inconsistent with defendant's claimed right to use the disputed property as a road. Because a dedication must be devoted to the dedicator's indicated purpose, *Baldwin Manor, Inc.*, *supra* at 430, and Kalamazoo Avenue was not used for a road, it logically follows that defendant's easement theory affords no basis for disturbing the trial court's decision. Actual notice was not required because the evidence supported the trial court's finding that the area was never developed or used as a road. Accordingly, defendant's characterization of plaintiffs' acts of building a barrier, fence, culvert and drain pipe as duties imposed on any easement holder to protect, repair and maintain an easement in reliance on *Fry v Kaiser*, 60 Mich App 574, 580; 232 NW2d 673 (1975), is not persuasive, given the evidence that no roadway was developed that required maintenance or repair. *Nicholls*, *supra* at 349. In sum, because plaintiffs' entry onto the disputed property for purposes other than a private road cannot reasonably be viewed as a permissive entry, we find no support for defendant's position that the trial court applied an incorrect legal standard.

Defendant also argues the trial court committed either an error of law affecting the trial court's findings or clear error in its finding that plaintiffs proved their respective claims of adverse possession because the trial court's opinion misquoted *Carney v Loveday*, 268 Mich 640; 256 NW 577 (1934), as requiring "actual notice" or the presumption of notice. We disagree. Although we agree that the trial court misquoted *Carney* because the "actual notice" or presumption of notice standard cited in the trial court's opinion is not set forth in *Carney*, *supra*, we nonetheless reject's claim of error because the court actually applied the correct principle of law regarding a claim of adverse possession, i.e., that plaintiffs must establish, "by clear and cogent evidence" that the true owner had either actual notice of a hostile claim or that the

possession was so open, visible, and notorious to give rise to a presumption of notice. See *Burns v Foster*, 348 Mich 8, 14; 81 NW2d 386 (1957); *Kipka v Fountain*, 198 Mich App 435, 439; 499 NW2d 363 (1993). *Rose v Fuller*, 21 Mich App 172, 174-175; 175 NW2d 344 (1970).<sup>4</sup>

Defendant next claims that the trial court erred when it determined that plaintiffs established their respective claims of adverse possession against defendant. We disagree. Plaintiffs developed and added structures and other improvements to the area referred to as Kalamazoo Avenue for the requisite fifteen years. MCL 600.5801(4). Wahman erected and maintained cages of large rocks and concrete clubs, constructed the addition to her cottage home directly on Kalamazoo Avenue, and kept trespassers off the property. The Halls maintained fencing across both ends of Kalamazoo Avenue, and added retaining walls that cut into Kalamazoo Avenue. The evidence introduced by plaintiffs was sufficient to establish that the possession was exclusive as to the true owner and involved no common occupancy with respect to the public. *Leroy v Collins*, 176 Mich 465, 475; 142 NW 842 (1913). In sum, plaintiffs established “clear and cogent proof of possession that is actual, visible, open, notorious, exclusive, continuous and uninterrupted for the statutory period of 15 years, hostile and under cover of claim of right.” *Burns, supra* at 14.

In this regard, we specifically reject defendant’s claim that the Halls’ erection of a barbed wire fence across the eastern terminus of Kalamazoo Avenue or the erection of a seasonal snow fence were insufficient “hostile” acts to satisfy a claim of adverse possession. The fencing of property, with intent to claim title, can establish adverse possession. *Arduino v Detroit*, 249 Mich 382; 228 NW 694 (1930). Here, evidence that the Halls fenced the property on the east and west, even giving due regard to the evidence that the snow fencing on the west side was rolled back in the summer, when the cottages were typically in use, to provide use of a private walkway to the cottage, would put a titleholder on clear notice of an adverse use was being attempted. The fencing of the property was hostile because it was inconsistent with the titleholder’s rights. *Killips, supra* at 259.

Next, defendant argues that certain of the trial court’s findings regarding Wahman’s claim were erroneous. Again, we disagree. Specifically, defendant argues that the trial court’s clarified judgment, that Wahman was entitled to only that portion of Kalamazoo Avenue closest to her lot, was inconsistent with the trial court’s prior determination that Wahman had established a claim for adverse possession by the hostile acts of placing a culvert and drain pipe and constructing a concrete seawall outside the area adjacent to Wahman’s lot. We disagree. We note initially that defendant has not properly presented this issue for appellate review, having failed to provide any citation to legal authority supporting this contention. *Prince v MacDonald*, 237 Mich App 186, 197; 602 NW2d 834 (1999). Moreover, a party may not merely announce a position and leave it to this Court to discover and rationalize its basis. *Eldred v Ziny*, 246 Mich App 142, 150; 631 NW2d 748 (2001).

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<sup>4</sup> Accordingly, for the same reasons we reject, as meritless, defendant’s claim the trial court improperly cited *Smith v Crandell*, 332 Mich 44; 50 NW2d 718 (1952).

In any event, we disagree with defendant's claim of error. "Title by adverse possession, in the absence of color of title, can extend no farther than the boundaries of that land which is actually used and occupied for the statutory period by those claiming title by adverse possession. They can acquire nothing beyond that which is actually possessed, used, controlled and occupied by them for the statutory period." *Bankers Trust Co v Robinson*, 280 Mich 458, 463; 273 NW 768 (1937).

Here, with regard to Wahman's claim of adverse possession, the evidence indicated that a number of improvements were made to the area referred to as Kalamazoo Avenue, which abutted Lot 64, and which would give a titleholder notice that one or more lot owners were adversely possessing the area referred to as Kalamazoo Avenue. Contrary to defendant's claim that Wahman presented no evidence of adverse possession to the west portion of Kalamazoo Avenue, the trial court's finding that Wahman proved her claim of adverse possession for the requisite fifteen years was supported by probative evidence. Fences and a concrete barrier were installed on the west side of Kalamazoo Avenue. Further, the fact that Wahman's cottage partially blocked the area known as Kalamazoo Avenue is further evidence of acts or use inconsistent with any right to use the disputed property as a road, irrespective of any other adverse acts she may have committed against other lot owners in the Chicago Addition. Although reasonable minds might disagree how to view the evidence, the trial court did not clearly err in treating Wahman's actions as indicative of an assumption of control. *Rose, supra* at 175. Accordingly, the evidence indicated that Wahman's possession along the western portion Lot 64 was exclusive as to the true owner and involved no common occupancy with respect to the public. *Leroy, supra*. Accordingly, after reviewing the record, we are not persuaded that defendant established any basis for disturbing the trial court's finding that Wahman proved her adverse possession claim with respect to the area adjacent and contiguous to her portion of Lot 64, irrespective of any other improvements or structures by Wahman on the eastern portion of Kalamazoo Avenue.

Next, defendant contends the trial court erroneously applied "abandonment" principles to divest it of title. We disagree. "It is generally agreed that a fee simple in real property may not be abandoned, but that, in order to divest title to such interest, other facts and circumstances must be shown, such as adverse possession . . . ." *Michigan State Hwy Comm v St Joseph Twp*, 48 Mich App 230, 237; 210 NW2d 251 (1973). "However, there may be an abandonment of an inchoate or lesser interest in realty, such as an easement, railroad right of way, interest under a contract for the purchase of realty homestead, highway, mining lease, or land dedicated to a public use." *Id.* (emphasis in original.)

Here, it is not necessary for us to decide whether the trial court erroneously applied "abandonment" principles because there is no indication in the trial court's opinion that its decision was based on a determination that defendant, or its predecessors, abandoned its interest in the disputed property. Rather, as discussed, *supra*, the trial court decided the issue on the basis that plaintiffs established the elements of adverse possession. Thus, because we find no record support for defendant's claim that the trial court erroneously applied "abandonment" principles to divest it of title, we conclude this claim of error lacks merit.

Regarding defendant's claims that the trial court erred in denying its motions for a mistrial or a new trial, we deem these claims abandoned and decline to address them because defendant has failed to sufficiently brief them with citation to supporting authority. *Prince, supra* at 197; *Eldred, supra* at 150. We similarly decline to address defendant's claim that the

trial court should have permitted additional residents of the Chicago Addition to be added as defendants. Defendant has insufficiently briefed this claim to invoke appellate review. We note, however, that the trial court did not determine the rights or property interests of other lot owners in the Chicago Addition. Consistent with MCR 3.411(H), the court only determined the rights of the parties before it.

Defendant's remaining challenges to the trial court's decision afford no basis for reversal of the judgments. To the extent defendant's allegations of error lack appropriate citations to the record in support of their claims, they are not properly presented. *Prince, supra*.

#### IV. Conclusion

Defendant has not established either an error of law affecting the trial court's findings, nor clear error in its finding that plaintiffs proved their respective claims of adverse possession.

Affirmed.

/s/ Richard Allen Griffin

/s/ Kurtis T. Wilder

/s/ Brian K. Zahra